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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of GroupMe, Inc.'s Petition for an Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 12-1180 July 24, 2012
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Gerald Roylance's Comments on GroupMe's Petition

I. Introduction

In DA 12-1180,¹ the FCC seeks comment about GroupMe's March 1, 2012 petition.² Generally, GroupMe's petition (1) renews a common but misguided attack on the definition of "automatic telephone dialing system" ("ATDS") and (2) seeks a liability waiver when it presumes a client has prior express consent. These are not hard issues. GroupMe's system is an ATDS. GroupMe does not need a liability waiver; it can either get prior express consent directly, or it can seek indemnity from the "group creator" per the Terms of Service ("ToS") agreement.³

GroupMe's system is clearly an ATDS. It has a database that stores the cellular telephone numbers of the different groups. When GroupMe needs to contact a group, the system sequences through the database, and dials telephone numbers without human

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7021992529>, "Consumer And Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc."

² GroupMe, Inc., "GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification", March 1, 2012, <http://apps.fcc.gov/ecfs/document/view?id=7021871907>

³ GroupMe Terms of Service includes an indemnification clause at page 4. GroupMe ToS filed in docket <http://apps.fcc.gov/ecfs/document/view?id=7021991199>. GroupMe is not surprised by the TCPA lawsuits.

intervention. It fits out intuitive notion of an ATDS, and it fits the TCPA's definition. GroupMe knows it is an ATDS, but it desperately wants it to be something else. Hence it has raised the "capacity" argument about random or sequential number generators. We don't even need to go there. GroupMe stores telephone numbers in a database and dials them without human intervention. Using sequential or random number generators is a red herring. GroupMe wants the benefits of autodialing but wants to avoid the liabilities.

The FCC should find that GroupMe's system includes an ATDS. The FCC should also clarify the TCPA clause about the "capacity – to store or to produce" is disjunctive: if a system stores telephone numbers in a database, then it need not also have the capacity to produce telephone numbers with a random or sequential number generator. Point out that the TCPA's English is bad, but point to the reasonable interpretation.

GroupMe does not need any special dispensation about consent requirements. It would like immunity from TCPA lawsuits, but GroupMe is not functioning as common carrier. Although GroupMe may want its users to believe that its messaging service is similar to an email distribution list, it is not. GroupMe users surrender their rights to any content sent using the system:

By using GroupMe and submitting Content to a group, you grant us a world-wide, royalty-free, perpetual, fully sub-licenseable and non-exclusive license to reproduce, modify, adapt and publish the Content in connection with the Service.⁴

The clause is buried and uses terminology ("Content", "adapt") that sounds innocuous, but it means that GroupMe has a right to do data mining and all sorts of surreptitious activities. Imagine Paris Hilton using GroupMe to text her friends. GroupMe could save her messages, and sometime down the road, it could publish a book of her messages. GroupMe wants to gloss over the content issue. If the group members understood what could happen, they might not use the service.

GroupMe is looking inside the envelopes. GroupMe is also sending its own texts for its own purposes. GroupMe announces the commercial availability of the GroupMe app in a text to new members. GroupMe is highly involved, so GroupMe is not a common carrier and GroupMe is not entitled to the equivalent of the fax broadcaster's defense.

GroupMe is, however, entitled to indemnity from the group creators. GroupMe should get its relief from the group creators – and not the FCC.

But that indemnity clause in the ToS is another troubling thing. In the ToS, GroupMe has the group creator representing and warranting that each person in the group consents to receive text messages from GroupMe.⁵ However, GroupMe does not

⁴ ToS, p. 3

⁵ ToS, p. 2

mention the TCPA or warn the group creator that failure to obtain such consent subjects the group creator to \$1500 per text message. Group creators are consumers and not sophisticated (consider Paris Hilton again). GroupMe isn't telling them the pertinent information. Of course, if GroupMe did explain the blood and thunder, then consumers may decide not to use its service.

GroupMe acknowledges it currently being sued for alleged violations of the TCPA. Consequently, GroupMe's petition is forum shopping. In general, the FCC should decline forum shopping petitions.

There is also a significant point about the lawsuits. In GroupMe's Terms of Service (which GroupMe can alter at any time), GroupMe members have agreed to arbitration and not filing a class action.⁶ Presumably, any class action lawsuit against GroupMe must be from someone who has not accepted GroupMe's Terms of Service. That is, GroupMe is being sued by individuals who were made part of a group without their prior express consent. If the plaintiffs had accepted the Terms of Service, then GroupMe could force arbitration and kill any class action.

Consequently, the FCC should view the plaintiffs as cellular telephone subscribers who were genuinely injured by GroupMe's business practices. They would have received the text messages that GroupMe describes in the Terms of Service without their prior express consent. That is exactly the injury that the TCPA prohibits.

II. Automatic Telephone Dialing System

For the first issue, the definition of automatic telephone dialing system, what does the GroupMe system do? A group member sends a text to GroupMe intended for the group. GroupMe then runs down the database of numbers in that group, dials each cellular telephone number, and transmits the message to each cellular telephone. There is no human intervention. It certainly appears to be an automatic dialer.

There is no real distinction between GroupMe's system and a predictive dialer running down a list of numbers to call. If there is prior express consent, the call is permitted. If not, then the call is prohibited.

A. GroupMe ignores "to store" and fixates on "to produce"

GroupMe proposes a contorted definition that ATDS that will only complicate the issue. "By this Petition, GroupMe respectfully requests that the Commission clarify that the term 'capacity' as used in the statutory definition of ATDS under § 227(a)(1) of the TCPA encompasses only equipment that, at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered".⁷

⁶ ToS, p. 5

⁷ Petition, p. 3

Such a formulation would resolve nothing. The statement is nebulous and a touch circular: it interprets the TCPA definition of ATDS by referring to itself. It would not help a court interpret the TCPA. The “functionalities” are alluded to but not spelled out. What GroupMe wants is that an ATDS must use a random or sequential number generator. That’s the functionality that GroupMe wants to exploit “at the time of use”. It would exclude all database dialers – including modern predictive dialers.

GroupMe’s later clarification⁸ focuses on sequential and random number generators: “GroupMe requests that the Commission issue a ruling defining "capacity" to encompass only equipment that, at the time of use, could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered. GroupMe's technology, as discussed above, would not meet such a definition. It has never been able to randomly or sequentially generate and dial telephone numbers.”

GroupMe’s argument ignores the ATDS “capacity – to store” and just focuses on “to produce”. The logic would eviscerate the “capacity” logic in the 2003 Report and Order that found predictive dialers were ATDS. Modern predictive dialers do not dial random or sequential number generators. As the FCC pointed out, it is much more efficient to use a database. If GroupMe’s database is excluded, then a predictive dialer’s database would also be excluded. GroupMe uses a database of numbers, and it dials those numbers without human intervention. Predictive dialers use a database of numbers, and it dials those numbers without human intervention.

GroupMe ignores the FCC’s predictive dialer argument about storing numbers and then dialing those numbers. In fact, GroupMe is oblivious to predictive dialer issue.⁹

The problem is GroupMe does not want clarification of the definition but rather a definition that excludes GroupMe’s system from the definition. If we adopt the view that GroupMe’s system is an ATDS, there is no problem with the FCC’s prior interpretation. GroupMe’s system looks and smells like an ATDS, so it must be one.

The fundamental issue is how GroupMe and others read the TCPA definition and the FCC order. Petition pp. 9-10 characterizes the courts as following two interpretations; both interpretations rely on random or sequential number generators and are silent about storing telephone numbers in a database. GroupMe equipment actually dials telephone numbers (47 U.S.C. § 227(a)(1)(B)), so the attack must focus on 227 (a) (1) (A): the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator”. GroupMe ignores the “to store” in a database part and focuses on the dangling random or sequential number generator. The latter clause gets interpreted as if their system could be reprogrammed so as to generate numbers with a random or sequential number generator, then it is an ATDS.

Do not adopt GroupMe’s view. It is faulty.

⁸ Petition, p. 14.

⁹ Petition, pp. 15-16.

The FCC should clarify that the TCPA definition of ATDS is disjunctive. If the system stores numbers to dial, then the produce with a random or sequential number generator prong is irrelevant.

B. Congressional intent

The intent of Congress is clear. Congress did not want machines automatically calling cellular telephones or any number where the subscriber is charged for the call without prior express consent.¹⁰ What does GroupMe want? It wants its machines to call cellular telephones. To do that, GroupMe needs prior express consent. No esoteric interpretation of a statute is needed. Congress intended to restrict GroupMe's application. Congress may not have foreseen texting in 1991, but it certainly understood cellular phones and the idea of cost shifting. Any person who unleashes a machine to automatically make calls to a cellular phone must have prior express consent of the subscriber. Any suggestion that Congress did not want that result is ludicrous. Congress knows how to write statutes.

Yet GroupMe asserts the ludicrous: "The Commission should reject this formalistic interpretation of the TCPA and the Commission's implementing regulations, because the legislative history of the TCPA makes clear that Congress did not intend to capture a communication tool like GroupMe's in its scope when defining ATDS."¹¹ GroupMe focuses on the line seizure issue and ignores the plain language of the TCPA that forbids automated calls to cellular telephones even if those calls do not seize the line, do not contain an unsolicited advertisement, and do not impose an additional charge on the subscriber. Congressional intent is clearly indicated at 47 U.S.C. § 227(b)(2)(C): the statute intends to prohibit an ATDS from imposing a cost on the recipient or invading the recipient's privacy. GroupMe's text messages could do both. Prior express consent is required. GroupMe ignores the meat in 2003 Report and Order ¶ 132.

Congress amended the TCPA recently. When it did, it did not touch the definition of automatic telephone dialing system. More recently, Congress considered amending the TCPA under HR 3035, but HR 3035 collapsed because a looser restriction on automatic dialers had unintended consequences.

GroupMe also includes a gloom and doom argument about speed dialing with an iPhone. "Indeed, even a manually-dialed voice call to an intended number could be construed to violate the TCPA if the called party had not consented in advance to receive it, as long as the originating device had the "capacity" to place automated calls."¹² Yes, an iPhone could be turned into an ATDS, but when I manually call my friend Pam, I'm making a single call with significant human intervention. When I manually dial a number, I'm not dialing a stored or generated number. I'm dialing a number in my head. When GroupMe is dialing, it is dialing a number stored in the system's database. I dial one number. GroupMe might dial every number in the group.

¹⁰ 47 U.S.C. § 227(b)(1)(A)(iii)

¹¹ Petition, p. 12

¹² Petition, p. 11

C. Definition of Automatic Telephone Dialing Systems

The definition of automatic telephone dialing system is a perennial issue brought before the FCC. It doesn't take much to bring it up, and a win would be a huge win for businesses and a catastrophic loss for consumers. A text message is not "an artificial or prerecorded voice" or a fax, so text message solicitations would be fair game even though they go against the Congressional intent of preventing advertisers from shifting advertising costs to the consumer. Predictive dialers could then make unsolicited sales calls to cellular telephones. And, of course, that would mean that 3 percent of those calls would not have a live agent available. There would be a monumental invasion of privacy.

If GroupMe's system is not an ATDS, then GroupMe would be free to transmit texts containing unsolicited advertisements to every group member. Nothing in the TCPA subsection (b) would prevent that behavior. A text message is not a prerecorded voice, and it is not a fax. GroupMe could shift advertising costs to the consumer.

The Commission revisited the interpretation of ATDS in the 2003 Report and Order.¹³ It reaffirmed that position in 2007.¹⁴

The statutory definition is:¹⁵

- (1) The term "automatic telephone dialing system" means equipment which has the capacity –
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers.

The definition of ATDS at 47 U.S.C. § 227(a)(1) is awkward because it has a comma spliced phrase, "using a random or sequential number generator". My English teachers would trash it. What does the comma splice modify?

Business interests focus on that phrase to require that a random or sequential number generator be used for both "to store" and "to produce". They then claim that their system does not use a random or a sequential number generator, so the system cannot be an ATDS. That doesn't make sense in two different ways.

First, using the ordinary meaning of a "number generator", it doesn't make sense "to store" using a number generator. The comma splice most sensibly refers to the production of numbers and not to the storage of those numbers. More discussion on a sensible interpretation is below.

Second, if something is not random, then it has a sequence. Conversely, if something is in a sequence, then it is not random. There isn't a third option. Business interests want the sequence to be 1, 2, 3, 4, ..., but that is not the only sequence. Any

¹³ 2003 Report and Order, FCC 03-153, ¶¶ 131–133.

¹⁴ 2007 Declaratory Ruling (ACA Petition), FCC 07-232, ¶¶ 12–14.

¹⁵ 47 U.S.C. § 227(a)(1)

stepping through the records of a database would be done using random or sequential indices. It's a little strained, but we could view an index variable as a "number generator".

D. Sensible interpretation

The issue is how the dangling, comma-spliced, modifier "using a random or sequential number generator" should attach to the preceding "to store or produce telephone numbers to be called". Most attachments do not make sense. The phrase needs to modify something sensible without making other parts of the definition pointless.

If the modifier attached to "called" (the act of calling would require a random or sequential number generator), then the phrase would logically have gone in (B) instead of (A). Congress would simply require the dialing to use a number generator. Using a generator for the actual calling/dialing also does not comport with the machines Congress knew about in 1991 – machines that, as the FCC explained, might arbitrarily produce 10-digit telephone numbers to call.

If the modifier attached to "telephone numbers", it also does not make sense. Telephone numbers are not actors, so they do not use anything – especially not number generators.

"Using a random or sequential number generator" is an adverbial that describes how some action is done, so it makes sense for it to attach to a verb. In this case, the verbs are "store" and "produce".

The dangling modifier describes how telephone numbers are produced; it does not impact how telephone numbers are stored.

It makes perfect sense to produce telephone numbers using a random or sequential number generator. That's what some autodialers did in 1991. Matthew Broderick's character in the MGM/United Artists 1983 movie *WarGames* used an IMSAI 8080 to sequentially scan area code and prefix combinations for carrier tones. For each telephone exchange, it sequentially generated telephone numbers.¹⁶ The machine didn't have to store the numbers first; it just generated them on the fly. Such "war dialing" clearly violates the TCPA.¹⁷

It does not make sense to store numbers to be called using a number generator. Storing is simply recording the information. It could make sense to produce numbers using a random number generator and then store those produced numbers, but then using a number generator is still modifying the production of numbers. The disjunction is awkward. Furthermore, the word "store" becomes irrelevant. Congress could have

¹⁶ http://www.youtube.com/watch?v=ABYemfK_qD4

¹⁷ 2003 Report and Order, FCC 03-153, ¶ 135, about using autodialers to dial large blocks of telephone numbers to find facsimile machines.

simply prohibited producing telephone numbers with a number generator and then dialing them. Whether they were stored in the interim would be irrelevant: the violation would be for a machine that called telephone numbers that were randomly or sequentially generated.

The appropriate interpretation for (A) is that an ATDS as the capacity (i) to store telephone numbers to be called or (ii) to produce, using a random or sequential number generator, telephone numbers to be called. The interpretation makes sense, it gives every word a purpose, and it fits the historical context. Those statements make sense. The interpretation also fits the common sense meaning of an automatic dialing system. Either the automatic dialer can store a bunch of numbers to call, or it can produce some numbers to call using a number generator.

The statutory definition needs to make sense. The interpretation that GroupMe wants does not make sense.

Storing numbers to be called using a random number generator does not make sense. Why do I need a random number generator when I already know the number I want to store? If I want to store numbers, then I want to put them in a reasonable place (such as a customer file). If I store the telephone number in a random place, then it will be difficult to find it later when I need it.¹⁸ It could be anywhere. Storing numbers to be called with a sequential number generator also sounds awkward. What's the point of generating a sequential telephone number when I already have one to store.

Producing numbers to be called with a random or sequential number generator does make sense. A machine can produce telephone numbers by generating the last four digits at random. A machine could also step through the last four digits in a sequence such as 0000, 0001, 0002, etc.; it could also step through them in a sequence that increments by a number such as 7 and takes the result modulo 10000.

The sensible interpretation of 227(a)(1)(A) gives two clear statements. The first statement is simply the machine has the capacity to store telephone numbers to be called. The second statement is the machine has the capacity to produce telephone numbers to be called using a random or sequential number generator.

Those statements make sense. Either the automatic dialer can store a bunch of numbers to call, or it can produce some numbers to call using a number generator. If it can produce numbers on the fly with a number generator, then there is no need to store them.

Number generators would be used to produce numbers. If the TCPA only intended to prohibit the dialing telephone numbers that were created with a random or

¹⁸ Hashing is used in a database to minimize search times, but hashing is repeatable. Hashing is not a random number generator. A roulette wheel is a good example of a random number generator.

sequential number generator, then the “to store” prong would be superfluous. The TCPA could have simply prohibited dialing generated numbers.

E. Comparison with other statutes

Congress did something significant. Previous statutes were about “automatic dialing announcing devices” –machines that combined the ideas of both an automatic telephone dialing system and playing a prerecorded message. Congress went beyond that restricted notion. Congress separated the automatic telephone dialing system and the delivery of prerecorded or artificial voice messages. Congress prohibited the use of automatic dialing to health care facilities and cellular telephones whether or not a prerecorded voice was involved.

Congress also branched out by prohibiting the use of an artificial voice. Congress was looking to the future. In 1984 (seven years before the TCPA was passed), Digital Equipment Corporation had its DECTalk – a machine that could dial telephone numbers, place telephone calls, interpret DTMF and call progress tones, and speak using a text-to-speech engine.¹⁹ The WBCN radio station used the machine for its “Carlos DECTalk” character. DECTalk was also the voice of scientist Stephen Hawking. Congress was not going to allow an automaton escape merely because it used advanced technology that was not a recorded voice.

Congress was looking ahead. It was not trying to limit the prohibitions to existing technology.

Congress would have been aware of existing statutes prohibiting the use of autodialers.

California had an automatic dialer law before the TCPA was enacted and before there were cellular telephones. The aim was to define the machine that automatically called and delivered prerecorded messages. California Public Utilities Code § 2871 defines an “automatic dialing-announcing device”:

2871. As used in this article, "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called.

Clearly, there are two parts of the California definition. The first part is about automatic dialing, and the second part is about “announcing” the prerecorded message. California makes precisely the distinction mentioned above: the automatic dialing machine either stores numbers to be called (no generator involved), or it produces the numbers to called using a number generator.

¹⁹ DECTalk, Wikipedia, <http://en.wikipedia.org/wiki/DECTalk>

California uses the sensible dialing interpretation described above. Congress, confronted with cellular phones and faxes in addition to prerecorded calls, wanted to say something similar, and it used nearly the same words. It just failed to use clear English.

Congress, when it passed the TCPA, would have been aware of the California law. Clearly, Congress saw the need to include “to store” in its statutory definition of ATDS, and the California law provides some context about what “to store” means.

There are other state definitions covering automatic dialing.²⁰ They distinguish storing telephone numbers and using number generators to produce telephone numbers.

Pennsylvania²¹ statute: 52 Pa. Code § 63.1 Definitions:

Automatic dialing-announcing device—Automatic equipment used for solicitation which has a storage capability of multiple numbers to be called or a random or sequential number generator that produces numbers to be called and has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

Iowa Code § 476.57:

1. *Definition.* As used in this section, "ADAD equipment" means automatic dialing announcing device equipment which is a device or system of devices used, either alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers without the use of a live operator to disseminate prerecorded messages to the numbers selected or dialed.

2. *Prohibition.*

a. Except as provided in paragraph "b", a person shall not use, employ, or direct another person to use, or contract for the use of ADAD equipment.

b. Except for ADAD equipment which randomly or sequentially selects the telephone numbers for calling, the prohibition in paragraph "a" does not apply to any of the following:

(1) Calls made with ADAD equipment by a nonprofit organization or by an individual using the calls other than for commercial profit-making purposes or fund-raising, if the calls do not involve the advertisement or offering for sale, lease, or rental of goods, services, or property.

New York²² does not include a number generator – just storage:

NY Gen. Bus. § 399-p. Telemarketing; use of automatic dialing-announcing devices and placement of consumer telephone calls

²⁰ See also <http://saos.nictusa.com/aodocs/1087771.pdf>; <http://dnc.com/legal/statutes/>

²¹ Chapter 63, Telephone Service.

<http://www.pacode.com/secure/data/052/chapter63/chap63toc.html>

²² <http://codes.lp.findlaw.com/nycode/GBS/26/399-p>

1. Definitions. As used in this section, the following terms shall have the following meanings:
(a) "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called and is used, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called without the use of an operator;

South Carolina:

S.C. Code § 16-17-446. Regulation of automatically dialed announcing device (ADAD).
(A) "Adad" means an automatically dialed announcing device which delivers a recorded message without assistance by a live operator for the purpose of making an unsolicited consumer telephone call as defined in Section 16-17-445(A)(3). Adad calls include automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns.

Virginia:²³

§ 59.1-518.1. Definitions.
As used in this chapter:
"Automatic dialing-announcing device" means a device that (i) selects and dials telephone numbers and (ii) working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

Kansas K.S.A 50-670(a)(4):²⁴

(4) "Automatic dialing-announcing device" means any user terminal equipment which:
(A) When connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or
(B) when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance.

F. The FCC Interpretation

The FCC has interpreted the TCPA definition. Initially, the FCC focused on the random or sequential number generator aspect to conclude that a predictive dialer is not an ATDS, but later the FCC reversed course. The FCC's current view is the 2003 Report and Order interpretation, ¶¶ 131-133.

²³ <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+59.1-518.1>

²⁴ http://kansasstatutes.lesterama.org/Chapter_50/Article_6/50-670.html

Paragraph 133 points out Congress intended to prohibit automatic dialing to certain classes of numbers such as health care facilities and cellular telephones. “Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome.” The FCC said that to exclude predictive dialers “because it relies on a given set of numbers would lead to an unintended result.”

The Commission stated, “The statutory definition contemplates autodialing equipment that either stores or produces numbers.”²⁵ There are two prongs to the definition. The Commission noted that “[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily”. That statement refers to the producing telephone numbers prong but is silent about storing the numbers. The Commission also noted that “the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective.” That statement speaks to storing telephone numbers rather than producing them arbitrarily.

The FCC has followed at least part if not all of the sensible interpretation described above. The FCC distinguishes storing or producing numbers. It remarks that modern predictive dialers work from a database of numbers rather than using generators. All the pieces are there.

The problem is that many reading the FCC “capacity” argument interpret it as an alternate universe. The “capacity” argument is read that the system could be programmed to dial random or sequential telephone numbers. That is the escape being sought. The FCC should emphasize its database observation. If the system stores numbers and later dials those numbers without human intervention, then it is an ATDS. Random or sequential number generators are not needed when the infinitive is “to store”.

III. Release from liability

GroupMe wants an oral representation of prior express consent to suffice.²⁶ The Commission’s position on express consent is clear.

GroupMe, however, is disingenuous by omitting details in the lawsuits. Arguably, GroupMe could operate under something similar to the fax broadcaster exemption. In that capacity, GroupMe would not be involved in the content of any message. However, GroupMe does not simply carry the mail, but it also transmits its own text messages that describe its services. Looking at GroupMe’s Terms of Service cuts to the heart of the matter. The ToS states, in all capitals,

YOU REPRESENT AND WARRANT TO US THAT EACH
PERSON YOU ADD TO A GROUP HAS CONSENTED TO BE

²⁵ 2003 Report and Order, FCC 3-153, ¶ 132

²⁶ Petition, p. 3

ADDED TO THE GROUP AND TO RECEIVE TEXT MESSAGES FROM YOU AND ANYONE ELSE IN THE GROUP.”²⁷

Arguably, GroupMe can rely on this representation. If the representation is not true, then GroupMe can (and should) be sued, but it can seek indemnity from the group creator.

The item that GroupMe wants to slip by is that GroupMe considers itself part of the client’s group. The ToS also states:

Consent to receive periodic messages from GroupMe. As part of the Service, GroupMe sometimes causes administrative messages to be sent to members of the group. For example, upon adding a new member to a group, such new member will receive a welcome message, instructions on how to stop receiving messages, and information on how to avoid certain charges by downloading the GroupMe app. GroupMe also may inform group members who have not replied that they automatically will be removed from the group if they do not participate. GroupMe may send other administrative messages as well. BY SIGNING UP FOR THE SERVICE, YOU AGREE TO RECEIVE TEXT MESSAGES FROM GROUPME, AND YOU REPRESENT AND WARRANT THAT EACH PERSON YOU ADD TO A GROUP HAS CONSENTED TO RECEIVE TEXT MESSAGES FROM GROUPME.²⁸

Consent for these administrative messages is not a reasonable assumption on GroupMe’s part. It is implausible that the group creator has asked his friends this question and gotten their consent. That’s not human nature. GroupMe should not be entitled to rely on such contact condition.

Here’s what GroupMe can do. Instead of the group creator telling GroupMe the members telephone numbers, GroupMe can create the group telephone number. The group creator then sends a request to each prospective group member that includes the relevant details. If the group member consents to join, then the group member can send express consent directly to GroupMe. The group member has opted in, and GroupMe has written express consent.

GroupMe is soliciting, so it needs written consent.

GroupMe fails to abide by its own content restrictions. The ToS states, “* ensure that the Content is not spam, is not machine- or randomly-generated, and does not contain commercial content”²⁹

²⁷ GroupMe ToS, page 1, heading: “GroupMe Messages and Consent”.

²⁸ GroupMe ToS, page 2, heading: “GroupMe Messages and Consent”.

²⁹ GroupMe ToS, page 3, heading: “User Responsibilities”. See also Petition p. 5 that quotes this portion of the ToS.

Not only is GroupMe forwarding a client's message to the group, but it is also sending its own messages. The messages that GroupMe sends to group are machine generated. An employee does not sit down and compose the message. GroupMe designed a form letter, and GroupMe's machines then generate the message to send by filling in the blanks.³⁰

There's also the issue of "commercial content". GroupMe is a for profit corporation that has raised millions of dollars. Its investors expect to get a return on their investment.

In an introductory message, a new group member is told "how to avoid certain charges by downloading the GroupMe app." GroupMe is announcing the commercial availability of its application in that text message.

The GroupMe app intends to deliver machine-generated messages that advertise products. The app is part of an advertising campaign.

Steve Martocci, one of the founders of GroupMe, explains that GroupMe will be selling advertising. "At the end of this year the company will start testing highly targeted, opt-in advertising. "We will mine keywords," explains Martocci. "So if your group says 'sushi' five times, we can send you an ad for a sushi place.""³¹

Consequently, GroupMe is reading and analyzing the content of these messages.

Forty percent of the messages are delivered through the GroupMe app.³²

Although the Petition repeated emphasizes the non-commercial nature of typical GroupMe communications, the non-commercial aspect is irrelevant to the TCPA's prohibition on calls to cellular telephones. An automated call violates the statute if the call is sent to a cellular telephone without prior express consent. There are no exceptions for non-commercial calls, calls by tax exempt nonprofits, or political calls. 47 U.S.C. § 227(b)(1)(A)(iii). The FCC can only exempt calls that are not charged. 47 U.S.C. § 227(b)(2)(C).

To put it in simple terms, if GroupMe had texted a message on its own asking the recipient to download the GroupMe app, then that message would be part of GroupMe's larger advertising campaign. GroupMe is offering a commercial service. It offers free text messages in exchange for viewing some advertisements.

GroupMe compares its situation to that of UPS. (Petition page 16-19.) The comparison is inadequate. We know that UPS makes its income by selling shipping

³⁰ Petition page 7 describes four "administrative text messages" that are triggered by the group creator.

³¹ Eilene Zimmerman, "Jared Hecht and Steve Martocci, Founders of GroupMe", **Inc**, June 27, 2011, <http://www.inc.com/30under30/2011/profile-jared-hecht-steve-martocci-founders-groupme.html>

³² Petition, page 8.

services. The notifications that UPS discusses surround the delivery of a single shipment. Once the shipment is over, there is no need for continuing messages. There is presumably a business transaction involved between the shipper and the shippee.

We don't know how GroupMe makes its income, but it is presumably through advertising. GroupMe wants people to download its application, and that application probably subjects people to sushi advertisements. Certainly the app can get around the small character limitation of a text message.

GroupMe needs prior express consent for its own messages. Since GroupMe advertises, that consent must be written. If GroupMe relies on the representations of the group creator for prior express written consent, then GroupMe undertakes the risk that the group creator did not have that consent. GroupMe is not behaving as a common carrier, and so GroupMe is liable. GroupMe's recourse is to sue the group creator for indemnity.

If GroupMe were smart, it would get prior express consent from its recipients. That should be its object lesson from the lawsuits filed against it.

IV. Conclusion

The FCC should find that GroupMe's system is an ATDS.

The FCC should clarify that the comma spliced phrase modifies "to produce" and does not modify "to store". A system that dials a set of numbers in a database is an ATDS. That is the naïve notion of an ATDS, and it is the statutory notion.

The FCC might comment that although a conventional speed dialer application is not an ATDS, the "capacity" argument is still there. Hiring a bunch of people to merely press buttons (i.e., add human intervention by emulating a speed dialer) should not defeat the broad definition of ATDS. Common sense should apply.